

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 43894
Issued to: Roy L. Spencer

DECISION OF COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2367

Roy L. Spencer

This appeal has been taken in accordance with 46 U.S.C. 7702(b) and 46 CFR 5. 30-1.

By order dated 12 September 1983, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's mariner's license for two months, plus two months on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator on board the United States M/V RUST FLOWERS, under authority of the above captioned license, at or about 1955, 14 April 1983, Appellant did cause his tow to allide with the tank barge CE-64, the crane barge number 2, the freight barge VL-361, and the freight barge PB-142, while they were moored at the National Marine Services repair facility, mile 196.6, upper Mississippi River.

The hearing was held at St. Louis, Missouri, on 4 May 1983, and 1 June 1983. At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer based his case on a stipulation of the facts contained in the specification.

In defense, Appellant offered in evidence his own testimony, and the testimony of one additional witness, and navigation charts of the Mississippi River.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which she concluded that the charge and specification had been proved. She further announced that she would suspend Appellant's license for two months, plus two months on twelve months' probation.

The Decision and Order was served on 14 September 1983. Appeal was timely filed on 11 October 1983 and perfected on 5 December 1983.

FINDINGS OF FACT

On the evening of 14 April 1983 at about 1955, and for about two hours prior thereto, Appellant was serving as Operator on board the United States M/V RUSTY FLOWERS, and acting under authority of his license while the vessel was underway on the Upper Mississippi River. While Appellant was navigating the M/V RUSTY FLOWERS southbound with a tow of fifteen loaded barges, his tow collided with several barges which were moored at the National Marine Service repair facility at mile 196.6, Upper Mississippi River.

Appellant has been licensed to operate, and has been operating, towing vessels on the inland waterways for approximately six years. The M/V RUST FLOWERS is a 128 foot towboat with 4200 horsepower. It is not Appellant's regular vessel. However, he had been on board for two days before the accident and had also served on it a week or two earlier for a period of one or two days.

Prior to the trip in question, Appellant had talked with some of the other operators regarding the vessel. They told him that there were some problems with the operation of the vessel and that it had a tendency not to respond in a timely manner. He also spoke with his office concerning the vessel and was told that in its condition it could handle fifteen barges. The portion of the river related to the occurrence in question contains a bend with dikes on the inside of the bend that extend out from the bank toward the channel. These dikes are above water at the pool stage of the river and underwater during high water. On 14 April 1983 the water was high, and the dikes were submerged. There was an especially heavy current, and the wind was blowing into the bend in the same direction as the current. The combination of wind and current had a tendency to push the tug and tow toward the outside of the bend. Appellant was familiar with this portion of the river, having passed it some thirty or forty times during the past six years.

Appellant boarded the M/V RUSTY FLOWERS in St. Louis for the trip in question. He initially headed south, met another vessel with a tow, and assisted it into St. Louis harbor. After this, he built a tow of approximately 14 barges, which he took north for approximately ten miles to a location just above lock and Dam 26, which is located at approximately mile 203, Upper Mississippi River. There he gave his tow to a northbound vessel and took its southbound tow of approximately 15 barges.

Appellant was southbound with this tow out of Lock and Dam 26 when the incident in question occurred. As he entered the bend in the river at about mile 198, he was unable to see the dikes because they were submerged. He expected them to be marked by a black buoy near the end, although the chart included as an exhibit in the record does not show such a buoy. Because he was unable to see the

dikes or the buoy, he positioned his tow farther to the outside of the bend in the river than he might otherwise have done. As a result, he found himself too near the left descending bank of the river as he came out of the turn.

At the hearing, Appellant testified that had the M/V RUSTY FLOWERS responded as it should have, he would have been able to correct his position in the river and avoid the allision which subsequently resulted. He was, however, unable to do this. As a result, his tow allided with moored vessels at the National Marine Services repair facility, mile 196.6, Upper Mississippi River, about one and one-half miles below the bend.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

1) The Administrative Law Judge erred in failing to find that the presumption of negligence accompanying the allision was adequately rebutted;

2) The Administrative Law Judge erred in finding Appellant guilty of negligence because he was acting on the orders and assurances of his employer, and reasonably relied on those assurances;

3) The Administrative Law Judge erred in imposing a penalty that is too harsh;

4) The Administrative Law Judge erred in imposing a penalty with the improper intention of impressing the Respondent's employer.

APPEARANCE: Mark L. Kaltenrieder, of Thompson & Mitchell, 1 Mercantile Center, St. Louis, Missouri, 63101.

OPINION

I

Appellant asserts that the presumption of negligence accompanying the allision of the barges in his tow with the moored barges was adequately rebutted. I do not agree.

It is well-settled in both the courts of Admiralty and Commandant Decisions on Appeal that when a moving vessel strikes a stationary object, an inference of negligence arises and the burden is then on the operator of the vessel to rebut the inference of

negligence. The rule was well stated by Senior Judge Kirkpatrick in Patterson Oil Terminals v. The Port of Covington, 109 F. Supp. 953, 954 (E.D. Pa. 1952) affd. 208 F. 2d 694 (3rd Cir. 1953), and quoted in Appeal Decision 2284 (BRAHN) as follows:

The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things, unless the vessel has been mismanaged in some way. It is not sufficient for the Respondent to produce witnesses to testify that as soon as the danger became apparent, everything possible was done to avoid an accident. The question remains, "How then did the collision occur?" The answer must be either that, in spite of the testimony of the witnesses, what was done was too little or too late, or if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur...

The only escape from the logic of the rule and the only way in which the Respondent can meet the burden is by proof of the intervention of some occurrence which could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence -- not necessarily an act of God, but at least an unforeseeable and uncontrollable event.

Appellant asserts that the presumption of negligence was rebutted for two reasons: first, because the buoy he expected to be at the end of one of the dikes in the river was missing, causing him to steer farther to the outside of the bend than he would otherwise have done; and second, because the vessel did not respond as he expected it to when he tried to correct the position of his flotilla in the river.

With respect to Appellant's first contention, the Administrative Law Judge found "that the missing buoy was neither the cause nor contributing cause of the accident." She based this finding on the testimony of the Appellant and the fact that the accident happened more than a mile downriver from the missing buoy. In addition, she noted that it is not prudent for a pilot to rely solely on buoys, especially in high water, when heavy currents can carry them away. This latter observation is consistent with 33 CFR 62.25-55, which cautions all mariners not to rely solely on buoys for navigational purposes because of their potential unreliability. The regulation cautions "that buoys are liable to be carried away, shifted, capsized, sunk, etc." Under the circumstances, the Administrative Law Judge's evaluation of the credibility of Appellant's testimony and the circumstances of the case was not inherently unreasonable. Therefore, her findings will not be set aside on appeal. See Appeal Decisions #2333 (AYALA) and #2302 (FRAPPIER).

Appellant's contention that the failure of the vessel to respond as expected after rounding the bend before the allision should rebut the presumption of negligence is not persuasive. To rebut the presumption, Appellant would have to show that the vessel's lack of adequate performance was an event which could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence. BRAHN, supra. However, Appellant, by his own testimony, had notice from other operators that the vessel might not respond as quickly as expected. In addition, he had been aboard the vessel for two days immediately prior to the allision and for another two days a week or two earlier. During this time, he should have become thoroughly familiar with the vessel and its capabilities. There was ample time to test its ability to maneuver if he had any doubt about it. As the Administrative Law Judge observed, Appellant is responsible for knowing how the towboat with its tow can cope with any particular set of navigational conditions considering its horsepower, handling, his own experience, and the size and configuration of the tow. See Penn. Railroad Co. v. the S/S BEATRICE, 161 F.Supp. 136 (S.D.N.Y. 1958). The master of a vessel is expected to know the characteristics of his vessel. FRAPPIER, supra, Appeal Decision 2272 (PITTS). This duty includes making a reasonable effort to discover hazards. See Appeal Decision 2307, (GABOURY). With respect to the navigation and maneuvering ability of the vessel, this duty extends to operators of uninspected towing vessels as well as masters of vessels.

I note that Appellant testified that the M/V RUSTY FLOWERS appeared to perform properly for the two days during which he was aboard prior to the allision. With this in mind, it seems that any deficiencies in the vessel's ability to maneuver must have been, at most, minimal, and insufficient to reasonably be considered a potential cause of the allision.

There is no indication that any failure of the vessel to respond as expected was due to a sudden occurrence or undetectable condition. Appellant had ample time aboard the vessel prior to the allision to become completely familiar with its capabilities and to adequately test its ability to respond and maneuver. There is no indication that ordinary caution and reasonable tests of the vessel's ability would not have discovered any limitations which it had. Therefore, the Administrative Law Judge did not err in failing to find the presumption of negligence rebutted.

II

Appellant next asserts that, because he was acting on the orders and assurances of his employer, he should not be found negligent. I do not agree.

The licensed operator of a vessel is not excused from proper operation of his because his employers may order that operation. See Appeal Decision 2325 (PAYNE). Likewise, the assertion that he relied on the assurances of his employer is not sufficient. Where, as here, the operator has a reasonable opportunity to be aware of the deficiencies, if any, in his vessel, the fact that he is misled by his employer is not an excuse. Appeal Decision 2308 (GRAY).

III

Appellant asserts that the sanction is excessive under the circumstances. I do not agree.

In support of his argument, Appellant cites other cases in which lesser sanctions were awarded and asserts that the Administrative Law Judge did not properly consider the mitigating evidence that Appellant was misled by his employer and had no prior offenses. These assertions are, however, not convincing. 46 CFR 5.20-165 requires the Administrative Law Judge to enter an order on the facts and merits of each individual case. The fact that different orders may have been entered in other cases, therefore, does not help Appellant. The facts that Appellant has an unblemished prior record, and that his employer made certain representations to him concerning the condition of the M/V RUST FLOWERS, are noted in the Administrative Law Judge's Decision and Order. Appellant's contention that they were not properly considered by the Administrative Law Judge is, therefore, without merit.

IV

Appellant next asserts that the Administrative Law Judge improperly imposed the penalty with the intention of impressing Appellant's employer. This assertion, however, is not supported by the record, and is therefore without merit.

Appellant, in his brief, makes no citation to any statement by the Administrative Law Judge in the record or Decision and Order which would show that this was her purpose in imposing the sanction. Appellant must show an improper purpose on the part of the Administrative Law Judge to prevail. I will not presume an improper purpose.

CONCLUSION

There is substantial evidence of a reliable and probative character to support the findings of the Administrative Law Judge. The hearing was properly conducted in accordance with the applicable regulations. The sanction is appropriate under the

circumstances.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 12 September 1983 is AFFIRMED.

B.L STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed this 17th day of July, 1984.